

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

78-1448

MICHAEL J. BENNETT,

Petitioner,

v.

SECRETARY OF DEFENSE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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SECRETARY OF DEFENSE,
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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Michael J. Bennett, respectfully prays that a writ of certiorari be allowed by this Court for review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is captioned Michael J. Bennett, Appellant, v. Secretary of Defense, No. 78-1157, filed on December 18, 1978, and is printed as an appendix to this petition at page 1a. The Order of the District Court was filed on December 8, 1977, and is printed as an appendix to this petition at page 2a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2254.

QUESTION PRESENTED FOR REVIEW

1. Whether petitioner, Michael J. Bennett, has presented a claim susceptible of judicial resolution where he alleges an unconstitutional expenditure of federal funds extracted from him as taxes to provide military assistance to establish a religion and a religious state and to wage a religious war.

STATUTORY PROVISIONS INVOLVED

Foreign Assistance and Related Programs Appropriations Act of 1977, Pub. L. 94-441
Foreign Military Sales Act, Pub. L. 94-329

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article I, Sec. 8
U.S. Constitution, First Amendment

STATEMENT OF THE CASE

This case is based upon a complaint for injunction and declaratory judgment, verified by Michael J. Bennett, the plaintiff below, and including the uncontroverted affidavit of Rabbi Elmer Berger, an ordained rabbi, attesting to the fact that Israel is a theocracy based on an establishment of religion because it imposes a religious test as a prerequisite to citizenship.

Through his complaint, plaintiff seeks to (1) have the court declare unconstitutional the Foreign Assistance & Related Programs Appropriations Act of 1977 (Pub. L. 94-441), and enjoin the Secretary of Defense from expending federal taxpayers' monies under the Act insofar as they serve to provide military assistance and foreign military sales credits to Israel, Egypt, Jordan and Syria; and (2) have the court declare unconstitutional the Foreign Military Sales Act (Pub. L. 94-329), and enjoin the Secretary of Defense from expending federal taxpayers' monies under the Act insofar as they serve to finance certain administrative expenses of the Israeli Arms Purchasing Mission.

On December 8, 1977, Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia filed an Order in which he held that plaintiff's complaint should be dismissed because it presented a "non-justiciable matter since the claim involves a political question relating to foreign affairs". (App. 2a hereto)

On December 18, 1978, the United States Court of Appeals for the District of Columbia Circuit entered a judgment affirming the judgment of the District Court on the basis of *Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976).

Petitioner has vigorously pursued his claim under other similar appropriations Acts and has previously asked this

Court to review on certiorari a similar claim. *Bennett v. Secretary of Defense*, Civil Action No. 74-1033 (DCDC April 24, 1975, aff'd. No. 75-1606 (D.C. Cir. June 10, 1976), cert. denied, 97 S. Ct. 737 (1977).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner Bennett submits that there are special and important reasons within the meaning of Rule 19 of this Court for permitting a review on writ of certiorari in that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided the federal question involved in a manner that conflicts with applicable decisions of the Court.

The effect of the Court of Appeals' decision is to preclude judicial review of any question challenging the constitutionality of an Act of Congress where such act merely touches upon foreign affairs. This Court has made it clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

Baker v. Carr, 369 U.S. 186, 211 (1962). As set forth hereinbelow, since petitioner's claim "merely touches upon foreign affairs," the Court of Appeals has decided the federal question presented in a way which conflicts with this Court's decision in *Baker v. Carr, supra*.

In the case *sub judice*, petitioner asserts that the establishment clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Article I, Section 8. E.g., *Flast v. Cohen*, 392 U.S. 83 (1965). Petitioner maintains that the Acts which he challenges run afoul of this constitutional limitation insofar as the appropriations made

under the Acts are being used to establish a religion or a religious state or to wage a religious war. (See verified affidavit of Rabbi Berger, App. 7a).

Petitioner seeks only to enjoin the United States from infringing petitioner's constitutional right to have his government avoid excessive entanglement with religion. The courts should not be permitted to deprive petitioner of such a right merely because the controversy touches upon foreign relations. If such a proposition were to be given effect and carried to its logical conclusion, it would mean that Congress could levy taxes on petitioner and other United States citizens to raise money to subsidize the Vatican, the Catholic Church, Buddhists in Asia, or any religious organization they might choose.

Petitioner's complaint (App. 3a) and the uncontroverted affidavit of Rabbi Berger attached thereto asserts violation of fundamental constitutional rights guaranteed to plaintiff by the Constitution. A determination of the constitutional question presented in this case "falls within the traditional role accorded to courts to interpret the law." *Powell v. McCormack*, 395 U.S. 486 (1969).

The authority of Congress and the President in matters of foreign relations is unquestioned by petitioner. But that power, like any other power conferred by the Constitution on the executive or legislative branch cannot go unbridled. E.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As succinctly stated by this Court in *Baker v. Carr*, 369 U.S. 186 (1962):

"Deciding . . . whether the action of (a) branch (of the government) exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a respon-

sibility of this court as ultimate interpreter of the Constitution." *Id.* at 211.

Petitioner challenges only the *power* exercised by Congress, not national policy or politics. Petitioner maintains only that the assets and resources of the American people should not be used to support the Jewish religion or any other religion outside of this country any more than they could be so used within this country.

Accordingly, this Court should not allow the lower federal courts to evade the responsibility of halting an unconstitutional exercise of the taxing and spending power merely by summarily characterizing the issue as one presenting a political question. To do so offends the public policy position always maintained by this nation as a protector of human rights.*

As a matter of public policy of paramount importance to this country, petitioner maintains that this Court should review this matter; not only for basic policy reasons but for the purpose of clarifying this Court's analysis of the "political question doctrine" as set forth in *Baker v. Carr*, 369 U.S. 186 (1962).

CONCLUSION

For the above reasons, it is respectfully requested that this petition be granted.

Respectfully submitted,

ALBERT A. RAPOPORT
1108 National Press Building
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Attorney for Petitioner

*Israel was recently classified by the State Department, in a report prepared for the Senate Foreign Relations Committee, as a country which maintained policies offensive to basic human rights. *Reports on Human Rights Practices in Countries Receiving U.S. Aid*, Department of State (1979), GPO Stock No. 052-070-04831-0.

APPENDIX A**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 78-1157

September Term, 1978

Michael J. Bennett,
Appellant

v.

Civil Action No. 77-1402

Secretary of Defense

BEFORE: Wright,* Chief Judge; Tamm & MacKinnon, Circuit Judges

ORDER

On consideration of appellee's motion for summary affirmance, and of appellant's opposition thereto, and of the record on appeal herein, it is

ORDERED by the Court that appellee's aforesaid motion is granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed. See *Dickson v. Ford*, 521 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976).

Per Curiam

*Chief Judge Wright did not participate in the foregoing order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL J. BENNETT, :
Plaintiff :
v. : CIVIL ACTION 77-1402

SECRETARY OF DEFENSE, :
Defendant :

[Filed Dec 8, 1977]

ORDER

Upon consideration of Defendant's motion to dismiss, and upon consideration of the opposition thereto and the entire record herein, it appearing to the Court that this is a non-justiciable matter since the claim involves a political question relating to foreign affairs, *Michael J. Bennett v. Secretary of Defense*, Civil Action No. 74-1033 (DDC April 24, 1975), *aff'd.* No. 75-1606 (D.C. Cir. June 10, 1976), *Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 484 U.S. 954 (1976), *Michael J. Bennett v. Gerald R. Ford*, Civil Action No. 75-0667 (DDC May 30, 1975), it is by the Court this 8th day of December, 1977,

ORDERED, that Defendant's Motion to Dismiss be and it is hereby GRANTED, and this action is hereby DISMISSED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL J. BENNETT)
750 Hollowell Drive)
Huntington Valley,)
Pennsylvania 19006,)
Plaintiff,)
v.)
SECRETARY OF DEFENSE)
The Pentagon)
Washington, D.C. 20301,)
Defendant)

CIVIL ACTION
No. 77-1402
JURY TRIAL
DEMANDED

AMENDED COMPLAINT FOR INJUNCTION
AND DECLARATORY JUDGMENT

Plaintiff for his amended complaint served pursuant to Rule 15(a), Federal Rules of Civil Procedure (Fed.R.Civ.P. 15(a)), alleges:

1. This action arises under the Constitution of the United States, Article I, Section 8; the First Amendment to the Constitution of the United States; the Foreign Assistance and Related Programs Appropriations Act 1977, Public Law 94-441 (Exhibit "A" Hereto), and the Foreign Military Sales Act, Public Law 94-329, as hereinafter more fully appears. The jurisdiction of this Court is founded on the above constitutional provisions and statutory enactments and on 28 U.S.C. §1331, 2201, 2202 and 2282. The matter in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs.

2. Plaintiff is a citizen of the United States and a federal taxpayer and is required under Acts of Congress and

has and does in fact pay taxes to the federal government in substantial sums, including taxes paid at all times material to this litigation. Defendant is the duly appointed and acting Secretary of Defense as provided by Congress in 10 U.S.C. §133, to whom the President has delegated by executive orders various functions including administration of Public Law 94-441.

3. Defendant is unconstitutionally expending federal funds under the Foreign Assistance & Related Programs Appropriations Act, 1977, to provide military assistance and foreign military sales credits to Israel, Egypt, Jordan and Syria. These funds are being used by Israel to establish religion and a religious institution (See Exhibit "B") and by all four recipients to wage a religious war. It is unconstitutional for the United States to wage or support a religious war or to establish programs which result in excessive government entanglement with religion.

4. The Foreign Assistance & Related Programs Appropriations Act, 1977, is an unconstitutional exercise by Congress of its power to tax and spend for the general welfare under Article I, Section 8 of the Constitution in that Congress has authorized a substantial expenditure of federal funds in the amount of \$735,000,000 during fiscal year ending September 30, 1977, for the theocratic State of Israel (Exhibit "B" hereto) in violation of the First Amendment which provides that, "Congress shall make no law respecting an establishment of religion . . .", and \$700,000,000 to Egypt, \$70,000,000 to Jordan and \$80,000,000 to Syria to finance a religious war designed to disestablish the religion of Zionism and eradicate the religious Zionist State of Israel which actions are in contravention of the U.S. Constitution.

5. As a result, plaintiff alleges and verily believes that his tax money is being extracted and spent in violation of the specific constitutional protections against Congress using the taxing and spending clause in derogation of the establishment clauses, and the free exercise clause which operate as restrictions on the exercise of the taxing and spending power, and that the funds being so used are in no way related to the general welfare or common defense as mandated by the Constitution, Article I, Section 8.

6. The expenditure of these substantial funds has been ruled to be a budgetary question by the Office of Management and Budget and ruled not a foreign policy issue by the President, and is, therefore, not a political question since it uses funds raised from plaintiff and other taxpayers similarly situated to establish and disestablish a religion and perpetrate a religious state in Israel and to finance and support a religious war with damaging effect to constitutional and legal rights as secured by the United States Constitution.

7. Plaintiff further alleges that defendant is unconstitutionally expending federal funds under the Foreign Military Sales Act, P.L. 94-329, in that the United States, through the Defense Security Assistance Agency, is now or has been financing certain administrative expenses of the Israeli Arms Purchasing Mission, a branch of the Israeli Ministry of Defense, by providing \$2,800,000 in foreign military credits for the payment of aforesaid expenses including, but not limited to, telephone, telegraph and teletype charges (\$500,000); consultation fees for marketing research, engineering and quality control (\$500,000); U.S. legal fees (\$260,000); computer services (\$200,000); and U.S. travel by Israeli purchasing officials (\$70,000). (Exhibit "C" hereto).

8. The aforesaid expenditures under the Foreign Military Sales Act, P.L. 94-329, are an unconstitutional exercise by

Congress of its power to tax and spend for the general welfare under Article I, Section 8 of the Constitution in that such expenditures are being made to finance a religious war and to establish a religion and a religious institution, in violation of the First Amendment to the Constitution.

9. Plaintiff taxpayer has a clear and substantial stake in the outcome of this litigation, and alleges that he is a proper and appropriate party to invoke the Court's jurisdiction in this action in order to protect himself and other taxpayers similarly situated from the financial injury that is a direct result of the expenditures of federal tax funds by defendant in violation of plaintiff's rights and interests as guaranteed by the Constitution.

WHEREFORE, Plaintiff requests the Court:

1. To enjoin defendant from expending funds under the Foreign Assistance & Related Programs Appropriations Act, 1977, Public Law 94-441, and under the Foreign Military Sales Act, Public Law 94-329; and
2. To enter a judgment declaring that said Acts are unconstitutional for the reasons set out hereinabove.

JURY TRIAL DEMANDED

Respectfully submitted,

/s/ Albert A. Rapoport
 Albert A. Rapoport
 Attorney for Plaintiff
 1108 National Press Building
 Washington, D.C. 20045
 202-783-1140

COMMONWEALTH OF PENNSYLVANIA:
 COUNTY OF MONTGOMERY:

MICHAEL J. BENNETT, being duly sworn according to law, deposes and says that he is the plaintiff in the foregoing Complaint for Injunction and Declaratory Judgment and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ Michael J. Bennett
 Michael J. Bennett

Sworn to and subscribed before me
 this 9th day of Sept., 1977.

/s/ John T. Acton
 John T. Acton
 NOTARY PUBLIC
 My commission expires August 1, 1977

I, Rabbi Elmer Berger, being first sworn upon oath, deposite and state that I was ordained as a Rabbi at the Hebrew Union College of Cincinnati in 1932; that from 1943 to 1968 I served as operating head of the American Council for Judaism, and that from 1968 until the present I have been the president of American Jewish Alternatives to Zionism. I have written several books in relation to Zionism and contributed numerous articles on that subject to periodicals, including the Encyclopedia Britannica. I have studied the activities of the World Zionist Organization (WZO) and the Jewish Agency for Israel (JAI), and I am thoroughly familiar with the essential principles, practices and laws of Zionism which operate through the WZO/JAI in and beyond the sovereignty of the United States. In the Zionist State

of Israel and with the Zionist State of Israel the WZO/JAI operate as a functioning unit to fulfill the essential objective and intent of Zionism and Israel. The essential objective and intent of Zionism and Israel is explicitly stated in the laws and policies of Israel and in the record of the 23rd Congress of the WZO held in Jerusalem, Israel in August, 1951, "It (the State of Israel) is the supreme expression of the Will of the Jewish Nation for Redemption". The term "Jewish Nation" reads also "Jewish People". And it is my opinion, based on a lifetime of religious study, that the U.S. State Department was and is correct in rejecting the recognition of the concept "Jewish People" as a legal concept for use in U.S. and international law and diplomacy.

It is also my judgment based on my lifetime of study that Zionism is a theocratic movement and identification as a Jew, either by profession of faith or descent is a requisite for full and equal nationality rights. The State of Israel, predicated its "Law of Nationality" upon Zionism is a religious institution, a theocracy.

My judgment on the essential nature of Zionism and its principal institution, the State of Israel, is based on my study of the laws of Israel/WZO/JAI which work together to implement the Zionist concept of the process of "Redemption" of "The Jewish People". The essential laws are: (1) The Law of Return; (2) Israeli Nationality Law; (3) The Status Law; (4) The Covenant. These laws establish the religious (Zionist) criteria for full national rights and give Judaism the force of law of the State. The essence of each law is as follows: (1) The Law of Return establishes the Right to those who are judged "Jew" by the Zionist establishment to "Return" to Israel. This "Right to Return" is extended to "Jews" everywhere and forever. (2) The Israeli Nationality Law establishes the Right of automatic citizenship for "Jews" arriving in Israel under the

Law of Return. Immigration is not now necessary for a "Jew" anywhere in the world of any nationality to claim and receive Israeli citizenship and "protection" of Israel. (3) The Status Law, generated by and executed by the WZO and JAI and Israel's Knesset (parliament), establishes *unique* rights and limits of authority of the Government of Israel and the WZO/JAI operating within Israel and beyond, as in the U.S. (4) The Covenant is the law, generated and executed by the State of Israel and the WZO/JAI, which completes the Law of Return by establishing the Juridical (legal) joining of the State and the WZO/JAI in the process of Selection and Ingathering of those who Israel WZO/JAI define and judge as "Jew everywhere and for all time. The Covenant also assigns "responsibilities" to "The Jewish People", regardless of the legal citizenship of individual Jews.

The Zionist concept of "Redemption" is universally recognized as a religious concept. Together with the practice of the essential laws of WZO/Israel JAI, it changes the State of Israel from what otherwise would be a normal secular state into a religious theocratic establishment. The theocratic nationalism of Zionism gives the State its reason for existence. The declared "Central Task" of the State is fulfillment of the religious purpose called "Redemption". The "benefits" of "Redemption" in Zionism's context are limited in the abstract religious Zionist concept to "The Jewish People". The Zionist program of "Redemption" does not concern itself with the benefit of a single Jew or any human being in their individual person.

It follows that since the State of Israel is established on the Land formerly known as Palestine for the "Redemption" of "The Jewish People", the First Principle of Zionism's laws is the principle of Distinction and Discrimination which enables Israel/WZO/JAI to distinguish and select, worldwide,

"Jew" from "Non-Jew". Therefore, the "basic" laws of Israel WZO/JAI require and apply a religious racial test to all persons. The official criteria used by the State of Israel/WZO/JAI for judging a person and testing that person's religious identity are those criteria legislated and required by a body universally recognized as a *religious* body, the World Council of Orthodox Rabbis and its affiliate in Israel, the National Religious Party, which was until March, 1977 a part of Israel's government.

The essential elements of the official Zionist State criteria are: proof of one's *birth* of a "Jewish Mother" or *conversion* to Judaism according to "Orthodox Rabbinical Law" (not Reform Jewish Law or Conservative Jewish Law). Only after a person passively or actively submits to this religious authority of the State of Israel/WZO/JAI and passes the religious test does that person have the right to immigrate to Israel, the right to first class citizenship in Israel, the right to marry *only* another "Jew" in Israel, the right to own land and conduct commerce with and in Israel as only other first class, that is "Jewish", persons. The fusion of religion and nationality by Israel WZO/JAI is reinforced by Israel's Courts in "Shik v. Attorney General" (1973) (II) 27 p. D3 (Registration of Nationality) "For the purposes of the Population Register there was no material difference between religion and nationality." (Israel Law Review, January, 1974, Volume 9, Number 1, Israel Law Review Association, The Faculty of Law, Hebrew University of Jerusalem).

The essential effect of the operation of these laws is *the establishment* of religion in the U.S. and worldwide in the form of Zionism and its religious institution in the form of the theocratic State of Israel/WZO/JAI and the establishment of this religion and its institution is based upon the principle and practice of religious and racial discrimination. Zionism

and Israel/WZO/JAI establish a system of special rights for "Jews" of all nationalities by virtue of a "Jew's" passing the religious test of Zionism and thereby, according to Zionism's dogma, "belonging" and "having membership in" "The Jewish People". Zionism then seeks to attach all "Jews" who "belong" to "The Jewish People" to Israel, regardless of the present national identity of each "Jew" or that person's choice unless that person specifically renounces either (1) Judaism by converting to another religion or (2) Israeli citizenship or (3) Zionism in such a way as to be judged by Zionists as a person doing damage to "The Jewish People".

It is my judgment based upon direct knowledge that, when American "Jews" exercise the special rights legislated by the State of Israel/WZO/JAI as members of "The Jewish People", the rights of other Americans and Palestinians are violated and preempted for Americans who are not "Jewish" are "*a priori*" and by definition excluded from the same right. Especially excluded are Americans of Palestinian origin who are not of the accepted "Jewish" or Zionist religion. The effect of this discrimination is gross and consistent violation of human rights and consequent grievous human suffering.

And Zionism's principles and practices of exclusionary rights for "Jews", including American Jews, does injury to the right of other Americans who are Jewish but of origin in Arab lands other than Palestine to "return" to their homes. For Zionism's *Thesis* of excluding "Non-Jews" from the "Right of Return" to their home in Palestine/Israel has generated its *Antithesis*. For Jews generally, including especially those Americans who embrace Zionism's theocratic nationality, Zionist/Israel's assertion of the supra-national reach of its "Jewish People" nationality rights has, by reason of

the distinctions it makes based upon religion, often affected American Jews. They have, on occasion, been denied entry to Arab lands because of their religious identity while Americans who are not Jewish or Zionist may as a rule freely travel in Arab lands, some returning to their homes there.

Therefore, in my judgment the operation of Zionism worldwide and especially in the U.S. and in the Middle East is causing divisiveness among American people along sectarian lines which results in reciprocal religious discrimination with its concomitant sectarian split of the body politic and treasury. Zionism's claims and operations corrupt constructive humanitarian programs and they are fundamentally inconsistent with and violative of Spiritual Judaism and American Constitutional concepts of individual citizenship and Separation of Church and State. I therefore reject the religious and nationality claims of Zionism and Israel/WZO/JAI which claim all Jews including American Jews to be included in Zionism's self-segregating concept of "Jewish People" nationality and to attach these people through manipulation of religion to the theocratic Zionist State of Israel.

/s/ Elmer Berger
RABBI ELMER BERGER

Sworn to and Subscribed
before me this 2 day
of June, 1977

/s/ Elizabeth Gunderson
NOTARY PUBLIC